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Supreme Court of the United States

OCTOBER TERM, 1940

THE CITIZENS NATIONAL BANK
OF WACO, TEXAS,
Petitioner,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Respondent.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

THE CITIZENS NATIONAL BANK OF WACO, TEXAS,

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Of Counsel.

March, 1941.

HAUSER PRINTING CO., INC., NEW ORLEANS

SUBJECT INDEX

		PAGE
1. History of litigation	Petition	2
2. Grounds of jurisdiction	Petition	1
	Brief	11, 28
3. Defendant bank did not participate in defalcation, had no knowledge of same and received no benefits therefrom and paid only checks properly signed	Petition	2, 8
	Brief	11
4. C.C.A. 5 decided an important question of local law in a way probably in conflict with applicable local decisions in that it held that Bank violated the Texas law if it honored checks "other than to treasurers or for approved commissions", whereas the Texas statutes and jurisprudence expressly require the depository banks to honor checks drawn for cash and drawn for many other purposes	Petition	3, 9
	Brief	13
5. The defaulting Tax Collector drew $14,562.56 from his official account and used it to make good a shortage in another official account in another bank for which the same bonding company was responsible, thus paying a debt due by that bonding company. The CCA decision complained of permits the benefiting bonding company to recover this $14,562.56 from the bank from which it was drawn	Petition	4, 9
	Brief	25

SUBJECT INDEX—Continued

PAGE

6. Texas Revised Civil Statutes, Article 6003, as construed by the Texas authorities give to petitioning bank a right of action against respondent bonding company for any injuries received from the Tax Collector. The opinion of CCA 5 complained of disregards these statutes and this jurisprudence and permits the bonding company to recover from the bank ..... Petition 4, 9
Brief 28

7. Petitioning bank has properly accounted for the entire sum with which it was charged ..... Petition 4, 10
Brief 33

8. Addenda, containing reprints of the applicable articles of the Revised Civil Statutes of Texas ..... Brief 38

TABLE OF CASES

	Page
American Indemnity Co. v. Red River National Bank, 132 S. W. (2) 473	34
American Surety Co. v. Citizens National Bank, CCA 8, 294 Fed. 609	13
American Surety Co. v. Robinson, 53 Fed. (2) 22	10, 13, 33
American Surety Co. v. Lewis State Bank, 58 Fed. (2) 559	13
Arbuckle, Collector v. State, 16 S. W. 876	24
Bordelon v. Philbrick, 84 S. W. (2) 710	4, 8, 9, 10, 29, 32
Bracken v. Cato, 54 F. (2) 457, 458	31, 32
Brown v. Gessellshaft, 104 Fed. (2) 227	21
Citizens Natl. Bank of Waco v. Fidelity & Deposit Co. of Maryland, 100 Fed. (2) 807, 101 Fed. (2) 974; 307 U. S. 626	4, 5, 6, 8, 12, 13, 15, 18, 20, 23
Commonwealth v. Farmers Deposit Bank, 264 Ky. 839, 95 S. W. (2) 793	13
Cochran v. M. & M. Transfer Co., 110 Fed. (2) 519	21
Corpus Juris, Vol. 22	25
Dickens v. Howard, 67 Fed. (2) 263	24
Empire Trust Co. v. Cahan, 274 U. S. 473	24
Ellison v. Georgia R. R. Co., 13 S. E. 809	22
Federal Reserve Bank v. Panama City, 87 Fed. (2) 677	24
First National Bank vs. Farrell, 272 Fed. 371	27
German Savings & Loan Society vs. Tull, 136 Fed. 6	27
Howard vs. The United States, 184 U. S. 676, 46 L. Ed. 754	31, 32
Johnson v. Cadillac Motor Co., 261 Fed. 878	22
M. K. & T. Ry. Co. v. Merrill, 70 Pac. 358, 59 L.R.A. 711	22
Mason County v. Dickson, 100 S. W. (2) 5	24
Memphis, etc., R. R. Co. vs. Dow, 120 U. S. 287	27

TABLE OF CASES—Continued

PAGE

Messenger v. Anderson, 225 U. S. 436 ..... 21, 22
Miller v. State, Tex. Civ. Ap., 53 S. W. (2) 792 ..... 5, 14
National Surety Co. v. Arosin, 198 Fed. 605 13
New Amsterdam Casualty Co. v. First Natl. Bank of Gilmer, 134 S. W. (2) 470 34
Q. & A. P. Ry. Co. vs. Wichita Bank & Trust Co., 93 S. W. (2) 701 ..... 7, 9, 24

Revised Civil Statutes:

2535 ..... 7, 9, 15, 16, 18, 38
2549 ..... 7, 15, 18, 29, 38
3891 ..... 7, 9, 17, 40
3898 ..... 7, 9, 40
3937 17
3989-a 17
6003 ..... 4, 8, 9, 10, 28, 30
6675 ..... 7, 9, 41
7132 ..... 7, 9, 42
7141 ..... 7, 17, 40
7142 ..... 7, 9, 42
7249-a 12, 42
7250 ..... 2, 6, 7, 8, 9, 15, 18, 19, 20, 25, 26, 28, 33, 34, 35, 44
7264 ..... 7, 9, 44
7264-a 7, 9, 17 44
7285 ..... 7, 9, 45
7294 46
7296 46
7331 17
7332 ..... 7, 9, 17, 46
7333 ..... 7, 9, 48
7335 ..... 7, 9, 17, 49
7335-a 7, 9, 17, 50
7336-f 7, 9, 17, 50

State vs. Harvey, 15 S. W. (2) 82 3
Stokes v. State, 254 S. W. 398 24
Tabor vs. McKenzie, 49 S. W. (2) 874 ..... 4, 8, 9, 10, 29, 31, 32
The Livingstone, 130 F. 749 28

No. _____

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OF WACO, TEXAS,

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vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Petitioner, The Citizens National Bank of Waco, Texas, seeks a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review its judgment (R. 162) rendered January 13, 1941 (rehearing refused March 8, 1941) affirming the judgment of the District Court of the United States for the ~~Eastern~~ Western District of ~~Louisiana~~ Texas, rendered May 2, 1940 (R. 45).

This application is made prior to April 7, 1941.

II.

Jurisdiction of this Court is asserted under U.S.C.A., Title 28, Sections 347 and 377, and Rule 38 of this Court,

particularly the clause permitting certiorari where a Circuit Court of Appeals has "decided an important question of local law in a way probably in conflict with applicable local decisions," and because the questions are of **wide public interest** since every one of the numerous depository banks in Texas is directly affected.

III.

Summary and Brief Statement

1. Gibson Gayle, a Texas tax collector, defaulted. The District Court held (R. p. 40, §14) and no one, we believe, denies that:

> **"The shortage of Gibson Gayle was a result of his embezzlement and defalcation, and the defendant bank did not participate in same or have any knowledge or notice of such shortage, nor did it receive any benefits from said defalcation of Gayle; that all of the checks paid by defendant bank on said Collection Account or any tax collection account maintained by Gayle with it were signed by Gibson Gayle, as tax collector, or by his authorized deputy."**

Fidelity & Deposit Company of Maryland was surety on Gayle's official bond. It admitted the defalcation and paid the loss, amounting to $52,268.98, to the State. Thereupon, claiming to be the subrogee of the State's rights, it sued for that amount petitioner, The Citizens National Bank of Waco, Texas, which had been used as the depository by Gibson Gayle, Tax Collector, claiming that under the Texas Statute (Art. 7250 R.C.S.) such depository may honor checks on official deposits **only to treasurers or to the tax collector for approved commissions,** and that since defendant bank honored checks which, though properly and officially signed, were drawn

to persons other than treasurers or to the tax collector for approved commissions, it must show that such checks enured to the benefit of the State or County.

2. Defendant Bank, acting as it believed pursuant to a suggestion by the Comptroller (R. 72) and Attorney General (R. 72 and 73) of the State of Texas, approved by an appellate court of the State of Texas (R. 73 and 74, *State vs. Harvey*, 15 S. W. (2) 82), had made an agreement with Gayle that he might deposit all of his collections and monies in a non-interest bearing **collection account,** and thereafter allocate those funds to their proper accounts and this course had been followed. The Bank defended on the grounds:

(1) That it did not "participate in the shortage or have any knowledge or notice of same, or receive any benefits therefrom, and that all checks honored by it were properly and officially drawn. That the State and bonding company were at fault in not requiring Gayle to make weekly remittances as required by the Texas Statutes.

(2) That the Statutes of Texas, **as construed by the courts of Texas,** not only **did not** limit checks by tax collectors to checks **drawn to treasurers** or to tax collectors **for approved commissions,** but actually **required** that such checks be drawn to various persons and authorized that such checks be drawn to bearer or to the tax collector, and that all checks of Gibson Gayle honored by it were officially signed and were drawn as contemplated by the Texas Statutes, and that it had the right to assume that Gayle, a twice-elected public officer, was honestly discharging his duties."

(3) That plaintiff Bonding Company was surety, not only on the bond of Gibson Gayle here in question,

but also on another bond securing Gibson Gayle's State Highway Account; that there was a shortage in the said Highway Account, for which plaintiff Bonding Company was liable; that $14,562.56 was drawn by Gayle from his Tax Collector's Account in defendant Bank and placed in his Highway Account (R. 117 to 151) thereby **relieving** the shortage in that account and relieving of liability for the shortage in that account of **plaintiff Bonding Company,** which was surety for that account, and that it is illegal and unrighteous to compel defendant Bank to pay the benefiting Bonding Company the $14,562.56 which Gayle thus used for its direct benefit. (C.C.A. opinion R. 165) *ibid.* 168.

(4) That under Article 6003, Revised Civil Statutes of Texas, and the authoritative decisions of the Courts of Texas in *Bordelon vs. Philbrick, et als.*, 84 S. W. (2) 710, and *Tabor vs. McKenzie*, 49 S. W. (2) 874, the defendant Bank, in case it was occasioned a loss by the Tax Collector, had the right to recover from the Bonding Company on his official bond and that, under these circumstances, that Bonding Company can not recover from the Bank on the same transaction.

(5) That it, defendant Bank, had properly accounted for the entire sum with which it was charged.

IV.

This case was heard twice in the District Court and twice in the CCA 5th. The latter tribunal handed down three opinions, 100 F. (2) 810, 101 F. (2) 974, and the not yet reported opinion of January 13, 1941. (R. 162). From the first two decisions under which the case had been remanded for further proceedings, certiorari

was applied for and denied (307 U. S. 626), possibly because the decision was not final.

The District Court, presided over by a **Texas trained** judge, at the first hearing decided in favor of the bank, saying in part:

> "That the Statute on which the surety relied, requiring monies to be drawn from the depository by checks payable to the treasurers, **was not exclusive**; that the tax collector had the right to draw out monies from the bank by checks and deposit them with the treasurer in cash; that the bank was bound to honor checks drawn by him as tax collector on the collection account." (100 F. (2) 809). (Emphasis ours).

For this and other reasons he dismissed the suit.

On appeal, the **Circuit Court of Appeals split.** Judge Hutcheson, the member of that Bench **from Texas** and, therefore, presumably the most familiar with Texas law, was in favor of affirming the judgment of the District Judge **(also a Texan)** and dismissing the suit against the Bank. He said (100 F. (2) 811) in part:

> "It is the writer's view that the Bank is not liable to the Surety; that whether the agreement under which the funds were deposited in the Collection Account had the legal effect the Bank attributes to it, the Bank in good faith and with an honest purpose thought that it had that effect, and acting under it and in good faith and with honest purpose, it was deceived and overreached by appellant's principal, the tax collector.
>
> "Certainly, the tax collector and the surety were liable to the State for the tax collector's fraud. Miller v. State, Tex. Civ. Appeals, 53 S. W. (2) 792. The writer does not see how the surety whose bond guaranteed the fidelity of the principal can recover from the bank because of his infidelity where the proof, as here, shows that the bank was

> wholly innocent of any intentional or wilful wrongdoing, and if a wrongdoer at all, was only constructively so by entering into an agreement with the tax collector which the law did not precisely allow."

He, therefore, dissented from the opinion for and judgment of reversal. The majority of the Court, however, disagreed with Judge Hutcheson and remanded the case on the theory that Article 7250 R.C.S. of Texas imposed **an exclusive** obligation on the bank to permit funds to be withdrawn from Gibson Gayle's deposit **only** by checks payable to treasurers (110 F. (2) 810), or for approved commissions, and that if the Bank permitted checks to be drawn to any other payees, it violated the law and thereby burdened itself with the obligation of knowing and being prepared to show that such checks enured to the benefit of the fisc (101 F. (2) 975). **This decision was based on a completely erroneous understanding of the Texas Statutes, as construed by the Texas courts.** The case was remanded for further proceedings in accordance with the views of the majority.

At the second hearing in the District Court, the defendant Bank **demonstrated** that Article 7250 R.C.S. of Texas, which the Circuit Court of Appeals has held prohibited a bank from honoring checks of tax collectors **other than those drawn to treasurers or drawn to tax collectors in settlement of approved commissions** became effective in June 1917, and that subsequent to that date, there had been enacted the following statutes of the State of Texas, each of which provides for the payment of tax monies by the tax collector by his checks against the depository account **for purposes other than the payment of treasurers or in settlement of approved commissions,** to-wit:

Articles of the Revised Statutes, all of which are reproduced in the margin hereof, see addenda, p. 38, *et seq.*, as follows:

> Articles 7332, 7333, 7285, 7141, 7142, 7132, 3891, 7336-F, 7335, 7335-A, 7264-A, 7264, 6675 (repealed only in 1937), 3898, and 2535.

It moreover demonstrated that the Legislature of Texas in 1923, or six years after the adoption of R.C.S. 7250, had adopted R.C.S. 2535, which deals with funds in State depositories and reads in part:

> "All remittances to the treasurer made by the state depositories, or any person or persons, **may be in cash,** by registered mail, or insured letter."

(emphasis ours), and pointed out that since the tax collector was authorized to remit to the treasurer in cash, it was plainly beyond the power of the depository to prevent the collector from withdrawing funds from the depository account **in order to secure cash.** This is emphasized by the fact that Texas R.C.S., Article 2549, expressly requires the collector to deposit all tax monies in the County depository **as soon as collected.** If the collector must deposit in the depository immediately on collection and if he **may remit cash,** obviously he is authorized to **withdraw cash** from the depository. This being so, the Texas rule, as laid down in *Q. A. & P. Ry. Co. v. Wichita Bank & Trust Co.*, 93 S. W. (2) 701, was applicable. In that case, the Texas Court said:

> "The Bank is entitled to believe that the trustee will check the trust credits out of his personal account for proper trust purposes. * * *. To require the Bank to investigate such transactions would have put a burden upon the Bank for which it is not paid by the Trustee and would clog the handling of commercial paper in a way that would

be disadvantageous of trust business and also of business in general."

On the second trial, both the District Court and the Circuit Court of Appeals apparently thought that they were bound by the law of the case erroneously to continue to hold that the tax collector was required by the Texas Statute (R.C.S. 7250) to honor checks only when drawn to treasurers or in payment of commissions on approved accounts, and to hold that if checks were drawn otherwise, the depository was charged with the duty of showing that they inured to the benefit of the fisc. **No Texas judge sat in the C.C.A.** in the second hearing. Judgment was rendered against defendant Bank and in favor of the Bonding Company for the full amount claimed, namely $52,268.98, including the $14,562.56 which, as above stated, has been proven to have inured directly to the benefit of the Bonding Company.

In rendering that judgment the Court completely ignored R.C.S. 6003 of Texas (printed *infra*, p. 28), and *Bordelon vs. Philbrick*, 84 S. W. (2) 710, and *Tabor vs. McKenzie*, 49 S. W. (2nd) 874, Brief p. 29 which decisions of appellate Texas Courts **on a question of Texas law** expressly hold that a third person may recover on an official bond although that bond is not made payable to such third person.

V.

Petitioner contends:

(1) That it did not participate in the shortage or have any knowledge or notice of same, or receive any benefit therefrom, and that all checks honored by it were signed by Gibson Gayle, as Tax Collector, or by his authorized deputy. (Both Courts concede this, R. 40, paragraph 14, 100 Fed. (2) 811, quoted *supra*). (*Vid.* Brief, p. 11).

(2) That R.C.S. 7250 effective in 1917 has been modified by R.C.S. 2535, adopted in 1923, and also by Articles 7332, 7333, 7285, 7141, 7142, 7132, 3891, 7336-F, 7335, 7335-A, 7264-A, 7264, 6675 (repealed only in 1937), and 3898, and that under those Statutes, a tax collector **may draw checks to many payees other than treasurers, and may also withdraw from the depository funds necessary to put him in possession of cash** which he is authorized to remit to the treasurer, and that Texas law, as construed by the Texas courts, (*Q. A. & P. Ry. Co. vs. Wichita Bank*, 93 S. W. (2) 701), does not place on the trustee or depository the duty of policing such checks or of proving that their proceeds inured to the benefit of the fisc; that the Circuit Court of Appeals grievously erred in imposing such obligations on petitioner, and in so deciding, **decided an important question of local law in a way in conflict with applicable local decisions.** *Vid.* Brief, p. 13. That C.C.A. was in error in so holding on the first hearing and in worse error in holding on the second hearing that that incorrect ruling was the immutable law of the case.

(3) That the record shows that Gibson Gayle withdrew $14,562.56 from his account with petitioner and used it to make good a shortage in his Highway Account, for which the Bonding Company was liable, thereby directly benefiting the Bonding Company, and that neither the Texas law nor good morals permit the Bonding Company to be again paid that $14,562.56 by collecting it from petitioner, as is contemplated by the judgment here sought to be reviewed. *Vid.* Brief, p. 25.

(4) That under R.C.S. 6003 of Texas and the decision of the Texas courts in *Bordelon vs. Philbrick*, 84 S.W. (2) 710, and *Tabor vs. McKenzie*, 49 S. W. (2) 874, it is entitled to recover from the Bonding Company for any damage caused to it by Gibson Gayle,

the tax collector whose surety the Bonding Company was, and that this right necessarily eliminates any recovery by the Bonding Company from it on the same transaction, and that this important question of local law is likewise disregarded by the decision complained of. See Brief p. 28 where 6003 is set out in full and the *Bordelon* and *Tabor* cases epitomized. 53 Fed. (2) 122 *American Surety Co. vs. Robinson.*

(5) That petitioner was entitled to permit Gibson Gayle to withdraw his statutory commissions from the depository account, and that petitioner has, as a matter of fact, shown a correct withdrawal by Gayle of the items in that account. *Vid.* Brief, p. 33.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a date certain to be therein named, a transcript of the record and proceedings herein, and that the decree herein of the said Circuit Court of Appeals, Fifth Circuit, be reversed by this Honorable Court; and your petitioner have such other and further relief in the premises as to this Court may seem meet and just.

Respectfully submitted,

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THE CITIZENS NATIONAL BANK OF WACO, TEXAS,
Petitioner,

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FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Respondent.

BRIEF SUPPORTING APPELLANT'S PETITION FOR CERTIORARI.

PETITION V, POINT 1

The Bank Had No Connection With and Did Not Benefit by the Shortage

It is proven and the lower court found (R. p. 40, Finding No. 14), that:

> "The shortage of Gibson Gayle was a result of his embezzlement and defalcation and the defendant bank did not participate in same, or have any knowledge or notice of such shortage, nor did it receive any benefits from said defalcation of Gayle; that all of the checks paid by defendant bank on said collection account or any tax collection account maintained by Gayle with it were signed by Gibson Gayle as Tax Collector, or by his authorized deputy."

Judge Hutcheson held, 100 F. (2) 811:

> "* * * whether the agreement under which the funds were deposited in the collection account had the legal effect the Bank attributes to it, the Bank in good faith and with an honest purpose thought it had that effect and acting under it, in good faith and with honest purpose, it was deceived and overreached by appellant's principal, the tax collector."

It is shown that R.C.S. of Texas 7249a (addenda p. 43) contains a mandatory requirement that each tax collector shall pay over to the treasurer each week 90% of all the taxes collected during the preceding week, and R. 78, *et seq.* that "at least the weekly payments were not made according to the statutes." The State and the Bonding Company were at fault in not enforcing this requirement. Had they enforced it, the shortage would probably have been prevented.

If these proven and decreed facts are given their logical effect, they conclusively establish the superior equity of the bank. If it had no knowledge of the shortage and received no benefits therefrom and if all the checks which it honored were signed either by Gayle, the Tax Collector, or by his authorized deputy, and if as is demonstrated hereinafter the Texas statutes necessarily contemplate the drawing of checks by the Tax Collector for various purposes and to various payees, **including himself,** and if as is shown in this record all the checks on the defendant bank were so drawn as **not to violate any law,** necessarily it follows that the defendant bank is not liable for the shortage. **That liability should be borne by the Tax Collector's bonding company which was paid to assume and did specifically assume liability for the Tax Collector's fidelity** and which was at fault in not requiring weekly remittances.

PETITION V, POINT 2

The Texas Law Does Not Require that Checks on Depository Banks be Drawn Exclusively to Treasurers or for Commissions

(a) The Court of Appeals held, 100 F. (2) 810 § 2:

> " * * * If the appellant (bond company) is right in the position it takes, that the agreement was not lawful and that the invoked articles *supra* required the tax collector to deposit his collections in the bank as depository, **and the bank not to pay them out except on checks in favor of treasurers,** and the appellant as surety was entitled to rely on the bank's observance of the duty thus imposed upon it, we all think appellant (bond company) is right in its conclusion that it should have subrogation. For here would be no case of a bank being misled or deceived by the fraud of the surety's principal, as in American Surety Company vs. Lewis State Bank, *supra*; National Surety Company vs. Arosin, 8 Cir., 198 F. 605; American Surety Co. v. Citizens National Bank, 8 Cir., 294 F. 609; American Surety Co. v. Robinson, 5 Cir., 53 F. (2) 22; Commonwealth v. Farmers Deposit Bank, 264 Ky. 839, 95 S. W. (2) 793.
>
> "The case would be one of a bank **in violation of a positive law,** on compliance with which the surety had a right to rely, turning over to a collector on his check money which it was charged with keeping and with paying over 'only to treasurers entitled to receive the same on checks drawn in favor of such treasurer'." (Emphasis ours).

Continuing, the opinion recites that the majority thought the agreement unlawful to the following extent:

> "They think it was unlawful insofar as it undertook to change or affect the responsibility of the bank for moneys deposited with it, or to permit

> the bank to pay out the moneys except as required by statute."

and then gives Judge Hutcheson's dissenting views, as follows:

> "It is the writer's view that the bank is not liable to the surety; that whether the agreement under which the funds were deposited in the collection account had the legal effect the bank attributes to it, the bank in good faith, and with an honest purpose, thought that it had that effect, and acting under it, in good faith and with honest purpose, it was deceived and over-reached by appellant's principal, the tax collector.
>
> "Certainly, the tax collector and the surety were liable to the State for the tax collector's fraud. Miller v. State, Tex. Civ. App., 53 S. W. (2d) 792. The writer does not see how the surety, whose bond guaranteed the fidelity of the principal, can recover from the bank because of his infidelity, where the proof, as here, shows that the bank was wholly innocent of any intentional or wilful wrongdoing, and if a wrongdoer at all, was only constructively so, by entering into an agreement with the tax collector which the law did not precisely allow. He, therefore, dissents from the opinion for, and the judgment of, reversal."

It is to be observed that the C.C.A., by a **divided bench, Hutcheson, the only Texas trained judge on the bench, dissenting, overruled a Texas trained District judge** and held that the case was the case **"of a bank in violation of a positive law, on compliance with which the surety had a right to rely, turning over to a collector on his check money which it was charged with keeping and with paying over 'only to treasurers entitled to receive the same, on checks drawn in favor of such treasurer'."**

This position was reiterated on rehearing, 101 F. (2) 974, where the Court said, referring plainly to 7250 R.C.S.:

> "By the statute it can pay the public funds out on the tax collector's checks **to no others than treasurers.** * * *
>
> "The depository **paying checks to others than treasurers** must know and be prepared to prove its justification. If there is no justification shown, the depository stands as actively joining the tax collector in illegally paying out the public money, violating the law under which it acts as depository."

When that finding was originally made, the C.C.A. was under the erroneous impression that any payment made by a tax collector except to treasurers or to himself as payment for commissions **was an affirmative violation of the Texas statute law.** This conclusively appears from the above quotations. When the error was demonstrated on the second trial, the Court held that this completely erroneous finding on an important point to Texas law **was the law of the case.**

THAT THE FINDING ON THE TEXAS LAW IS ERRONEOUS WAS AFFIRMATIVELY AND CONCLUSIVELY SHOWN ON THE SECOND TRIAL OF THE CASE, AS FOLLOWS:

It is true that 7250 R.C.S. reads:

> "Except as to compensation due such tax collector, as shown by his approved reports, tax money deposited in county depositories shall be paid by such depositories only to treasurers entitled to receive the same on checks drawn by such tax collectors in favor of such **treasurers.**"

but it is also true that R.C.S. 2535 which was adopted **subsequent** to the adoption of R.C.S. 7250 reads:

"Remittances

"All State Depositories shall remit, free of charge, except such charges which such depository is not allowed or permitted to pay by reason of any Act of the Congress of the United States or any rule or regulation promulgated thereunder by either the Board of Governors of the Federal Reserve System or the Board of Directors of the Federal Deposit Insurance Corporation, to the Treasurer on his demand, all withdrawals of State funds, as provided for in the preceding Article. **All remittances to the Treasurer made by the State Depositories, or any person or persons, MAY BE IN CASH,** by registered mail and insured letter; by post office money order, express money order, of any company authorized to do business in Texas, or by any bank draft on any bank in the following cities: Dallas, Fort Worth, Waco, Houston, Austin, Galveston and San Antonio. * * * "

and R.C.S. 2549 provides:

"That it is the duty of the County Treasurer to deposit tax money collected in the depository immediately upon receipt of same."

Note that the R.C.S. 2535 expressly provides that:

"All remittances to the treasurer made by the State Depositories, or any person or persons **may be in cash.**"

Since the collector could remit in cash, and since he must deposit **all taxes as received,** it necessarily follows that **he was authorized to withdraw deposits in order to get cash** and he could only get cash by drawing checks **other than to Treasurers.**

In addition to this, as the C.C.A. has found in its opinion (R. p. 167).

(1) Article 3937 R. C. S. requires **the tax collector** to advance **to tax assessors** in counties having a population in excess of 70,000 funds with which to make assessments.

(2) Article 7141 R.C.S. provides for the payment by the tax collector **to county judges and district attorneys** of fees due them in inheritance tax assessments.

(3) Articles 7331-32 R.C.S. authorizes the payment **to ex-officers** of delinquent tax fees exempt under the old fee bill earned prior to January 1, 1931, and collected at a later date.

(4) Article 3891 R.C.S. requires the payment by the tax collector of **the premium on his bond.**

(5) Article 7336-f R.C.S. requires the payment **of compensation** for compiling delinquent tax records.

(6) Articles 7335-7335-A R.C.S. requires the payment **of compensation** to attorneys filing suits against delinquent taxpayers.

(7) Article 7264-A requires the tax collector to pay **compensation to contractors** for preparing plat books.

(8) Article 3989-A requires the remission of assessors' and clerks' fees **to the officers' salary fund.**

Copies of these Articles are printed by way of addenda to this brief and appear *infra* p. 38, et seq. As appears from the above recital, all of these eight payments are **payments to persons other than treasurers,** and none of these statutes **require that the payments authorized by them shall be made by checks.** The tax collector therefore would be well within his rights were he to draw one check to his own order for several of these items and from the proceeds of said check pay the items in

cash. **Nor could the bank prevent his doing so, or question the propriety of his action.**

This record therefore affirmatively demonstrates that the Texas law on this important point is as follows:

(1) The Tax Collector by Article 2535 (a statute passed **AFTER** R.C.S. 7250 and hence controlling it) is **authorized to pay the treasurer in cash,** and since under Article 2549 R.C.S. (See addenda p. 38), the Tax Collector was obligated to deposit all taxes immediately as received in the depository account, it follows that the Tax Collector was entitled to draw his checks on the depository account to his own order **in order to secure cash with which to pay cash to the treasurer.**

(2) The Tax Collector was specifically authorized by the statutes above enumerated, which statutes were enacted subsequent to the effective date of R.C.S. 7250, **to pay tax moneys from his tax account to persons other than treasurers.** The statutes which authorize him to make these payments **do not prescribe the manner in which he shall make the payments.** In the absence of express statutory inhibition, he could make those payments either in cash or by check on his account.

THIS BEING SO, THE BANK VIOLATED NO LAW WHEN IT PERMITTED THE CASHING OF CHECKS OTHER THAN TO TREASURERS. When it permitted the cashing of such checks, including checks to the tax collector's own official order, it did merely what it was **OBLIGATED** to do.

As stated *supra*, when the C.C.A. at the first hearing 100 F. (2) 810, 101 F. (2) 975, made the findings which it did, it did not have before it the foregoing provisions of the Texas Statutes. Had it had those provisions

before it, it of course **could not and would not** have made the finding, reading:

> "We all agree with appellant that once the monies were deposited by the collector in the bank as the authorized public depository, they could not be lawfully withdrawn **except by checks payable to the treasurers.**" (Emphasis ours).

since that finding **is in direct conflict with the express provisions of the statutes quoted.**

Under these circumstances, it seems (to quote the decisions) "plainly wrong * * * and to work a manifest hardship" on petitioning bank for the C.C.A., in the opinion handed down, after the law is fully set before it, to hold (R. p. 166):

> "It is the settled **law of the case** (by virtue of the decision on the former appeal) that all deposits, whether in the collection account or a specific fund account, were governed by the provisions of Article 7250. * * * "

(R. p. 167):

> "It is simply urged that inasmuch as the tax Collector was required and permitted by these several statutes to withdraw funds for purposes other than in making payments to treasurers, the bank was not required to scrutinize withdrawals and might assume that checks drawn to the tax collector were for payment of such items, since he could pay them either by check or in cash. However, as stated above, **the law of the case was settled** on the former appeal to the effect that the bank was liable for payments made **other than to treasurers,** unless the funds were affirmatively traced to the purposes required by law." (Emphasis ours).

The C.C.A.'s previous decision was expressly predicated on its erroneous finding that the tax collector was prohibited from paying out public funds **except on checks to treasurers.** Thus that Court said (101 F. (2) 975):

> "By the statute, it can pay the public funds out on the tax collector's checks **to no others than treasurers.** It may be that there is no breach of depository duty in paying checks known to be for commissions or other things for which the tax collector should pay out cash instead of putting it in the depository; and money mistakenly deposited might be restored. But in all these exceptional cases, the facts justifying the payment must be shown and are not to be assumed. The depository paying checks to others than treasurers must know and be prepared to prove its justification."

In using that language, that Court was saying: "The only statute authorizing the tax collector to withdraw money is 7250 R.C.S. That statute affirmatively provides that he **must** draw his checks **only for his own commissions and to the order of treasurers.** This being so, if he draws checks to anybody else, the bank in honoring those checks is conniving with him to improperly handle the public money." On the second trial, it was affirmatively shown that the statutes of Texas enacted subsequently to the enactment of R.C.S. 7250 specifically and directly authorize and require the payment by the tax collector of a large number of other items to a large number of persons **other than either treasurers or the collector for commissions.** Plainly, therefore, in honoring checks other than to treasurers and for commissions the bank was obeying the law, not conniving to break it. Moreover, these statutes do not prescribe the manner in which the payments were to be made. In the absence of such restriction, the tax collector was entitled to make

these payments either **in cash or by check,** and since he was obligated and authorized to make these payments, the bank not only had no duty to refuse to honor his checks, but had an affirmative duty to permit him to draw checks in order to put himself in cash funds wherewith to defray these duly authorized expenses.

Since the record on second appeal brought out these facts, which were not before that Court on the first appeal, it appears evident that that Court **should not have considered that the findings made on the first appeal were the law of the case,** which were **binding** upon it. The decisions to that effect are plain and plentiful.

We quote from *Messenger v. Anderson,* 225 U. S. 436, the opinion by Justice Holmes, as follows:

> "In the absence of statute the phrase 'law of the case' as applied to the effect of previous orders on the later action of the court rendering them, in the same case, merely expresses the practice of courts generally to refuse to open what has been decided, **and not a limitation of their powers."**

Brown v. Gesellshaft, 104 Fed. (2d) 227, U. S. Circuit Court, District of Columbia:

> "While it is true that the rule of the 'law of the case' would not prevent a different conclusion, if a clear case were presented **showing that the earlier adjudication was plainly wrong and that the application of the rule would work a manifest hardship,** there is no showing here of these facts."

In *Cochran v. M. & M. Transfer Co.,* 110 Fed. (2) 519, appears the following language:

> "The defendant moves to dismiss the appeal chiefly on the ground that under our previous

> opinion and mandate, plaintiff is concluded from pressing any issue involving counts 1, 2, and 3. The doctrine of the 'law of the case' is invoked. But that doctrine, like its twin brother, *stare decisis*, is not an inexorable command and **must not be utilized to accomplish an obvious injustice."** The case then quotes from *Messenger v. Anderson*, 225 U. S. 436.

The case of Johnson v. Cadillac Motor Co., 261 Fed. 878, (C.C.A. 2) has the following pertinent statements with reference to the court's attitude in changing "the law of the case." In quoting from *Ellison vs. Georgia Railroad Company*, 13 S. E. 809, the Chief Justice says:

> "Some courts live by correcting errors of others and adhering to their own."

The Chief Justice declares that when the Court is satisfied that it has fallen into an error:

> "The maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not *stare decisis*, but *fiat justitia ruat coelum.*"

The case also quotes from *M. K. & T. Ry. Co. v. Merrill*, 70 Pac. 358, 59 L.R.A. 711:

> "Counsel for defendant in error have evoked the rule *stare decisis*, and insist that the former decision must govern on the second appeal. This would come to us with more force, if we were not now considering the same case, with the same parties before the court. **If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally.** We are fully satisfied that the rule of the former case is shattered by the pressing

weight of opposing authority, and that reason is against it." (Emphasis ours).

The court continues as follows:

> "The fact that the action is the same action, and **the litigation has not yet terminated,** and the further fact that the original error, if error was committed, **was the error of a divided and not a unanimous court,** are circumstances which are entitled to consideration." (Emphasis ours).

At page 886 the court continues as follows:

> "We recognize the full force and effect of the doctrine of *stare decisis,* and the general rule that on a second appeal matters disposed of on the first appeal ordinarily will not be again considered. It is, like the rule of *res adjudicata,* not a mere rule of practice, inherited from a more technical time than ours. It is a rule 'of public policy and of private peace,' and is to be cordially regarded and followed in all proper cases. But the rule is not an **inexorable** one, and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society. We are satisfied that the present case falls under the exception to which we have referred."

The court then reversed the former judgment in the case and changed the "law of the case."

It is apparent from the quotation (*supra,* p. 15) **from the opinion of the C.C.A., 100 F. (2) 975, that that Court held the appellant bank responsible for the application of the funds to the purposes enumerated in the respective Texas Statutes.**

This requirement of the Court is an unreasonable requirement and is contrary to the established law of Texas and contrary to the equitable rules of justice and if permitted to stand would prevent any Texas bank safely from acting as a depository of trust funds.

Under the text book provisions, under the recitations from *Corpus Juris*, under the decisions of the Federal Courts and of the State Courts of the State of Texas, the appellant Bank **had a right to assume,** when it was honest, when it had no notice to the contrary, and derived no benefit from the violation, that Gayle was honestly performing his duties. This is true under the proposition of law that where there is a contingency upon which a public officer has a legal right to do a certain thing and he does that thing in his official routine the bank and other persons dealing with it have a right to presume that he is acting honestly and pursuant to his official duties.

Q. A. & P. Ry. Co. v. Wichita Bank & Trust Co., 93 S. W. 2, 701.

> "The Bank is entitled to believe that the trustee will check the trust credits out of his personal account for proper trust purposes * * *. To require the Bank to investigate such transactions would put a burden upon the Bank for which it is not paid by the trustee and would clog the handling of commercial paper in a way that would be disadvantageous of trust business and also of business in general."

The Texas cases, *Arbuckle, Collector v. State*, 16 S. W. 876; *Stokes v. State*, 254 S. W. 398; *Mason County v. Dickson*, 100 S. W. (2d) 5, support this proposition; also the case of *Federal Reserve Bank v. Panama City*, 87 Fed. (2d) 677; the case of *Dickens v. Howard*, 67 Fed.

(2d) 263; the case of *Empire Trust Co. v. Cahan*, 274 U. S. 473 (71 L. Ed., page 1158) support this principle.

See also *Corpus Juris*, Vol. 22, page 135, Section 68; Vol. 22, page 140, Section 70; Vol. 22, page 141, Section 71.

Petitioner therefore feels that it is justified in asking this Court to reverse the holding that the appellant Bank was charged in equity with seeing that all of the money represented by checks drawn by Gibson Gayle in his official capacity, payable to himself in his official capacity, was paid to either one or the other payees provided for in these nine civil statutes which were passed after Artcle 7250 on the ground that such a holding is a decision on an important question of local law in conflict with applicable local decisions.

PETITION V, POINT 3

The $14,562

The opinion of the C.C.A. (R. p. 165), states this point as follows:

> "It (petitioning Bank) also called an additional witness, Nolan C. Phillips, an accountant, and traced deposits from the collection account of the respondent bank to the highway account in the First National Bank of Waco, aggregating the sum of $18,603.45, of which $14,562.56 were shown to have been paid, $7,733.46 to the state and $6,830.10 to the county. These transactions were numerous and at practically all times when funds from the collection account in the respondent bank were withdrawn and deposited in the Highway account at the First National Bank, there was due to the state and county more than was then on deposit in the latter bank. **In other words the tax collector was short in that account and these**

deposits were evidently made to cover the shortage. Of course, it is contended that, at least to the extent of the $14,567.56, the funds were traced into the hands of the state and county and that appellee having been surety in both instances, received the benefit. For this reason, credit is claimed therefor against the sum demanded in this suit."

The same opinion (R. p. 168) rules on the point as follows:

"As to the plea of estoppel or superior equity as applied to **withdrawals to cover shortages in the highway account in the First National Bank,** we can see little difference between those circumstances and a case where the collector had deposited the moneys so withdrawn to his personal credit. The moneys deposited with the defendant were of a specific character, to go to specific departments of the state, whereas those in the highway account were of an entirely different nature and dedicated to other purposes. It was a complete diversion from the intended destination and to prevent which Article 7250 was enacted. It so happened that the surety, appellee here, **was also upon the bond of the tax collector with respect to the highway funds.** If the appellant bank had not permitted the collector to withdraw deposits in violation of Article 7250, no one can say whether or not he would have misused the highway funds and produced a shortage there. The appellant had thus made it possible to cover up. A different course might have led to prompt discovery by the state or surety causing the collector to make good from other sources before the shortage had grown to such proportions. On the other hand, the appellant's conduct made it easy. The funds were in its hands and **it was required to know the purpose of checks not made to treasurers,** while the surety might assume that it would

> insist upon the collector complying with the law. See *First National Bank v. Farrell*, 272 F. 371."

From this, it plainly appears that Tax Collector Gibson Gayle took money from the account of the depository bank and used that money to make good a shortage in the highway account on which also the bonding company was surety. Had he not used that money for that purpose, **the surety company would have been compelled to make good that shortage.** Gibson Gayle therefore used the money to pay a debt of the bonding company. Can the bonding company having thus received and used the money once, now be allowed to profit by its own wrong and to inflict a loss on the innocent defendant bank by again extracting that money from it? We know of no principle of subrogation which would justify such a procedure. The bed rock on which the surety company bases its claim is the argument that it has an equity superior to the equity of the bank. Surely, it cannot be argued that when a trustee steals to pay a surety company, the surety company can keep and profit by the stolen money and in addition collect that money a second time from an innocent custodian on the ground that it has a better equitable claim to it.

120 U. S. 287, *Memphis, etc., R. R. Co. v. Dow*:

> "The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties".

136 F. 6, *German Savings & Loan Society v. Tull* (C.C.A. 9):

> "Subrogation being the creature of equity will not be permitted where it works injustice to the rights of those having equal or superior equity."

130 F. 749, *The Livingstone:*

> "The doctrine (of subrogation) cannot be invoked to consummate injustice; it does not permit one party to secure an unfair advantage over the other; it does not permit the insurer to speculate, or profit or drive an unconscionable bargain."

It will moreover be observed that the C.C.A. has in passing upon this point reiterated the erroneous premise that the bank in permitting the Collector to withdraw deposits violated Article 7250 and was required to know the purpose of all checks not made to treasurers. We have under Point II demonstrated the error of this position.

PETITION V, POINT 4

R.C.S. of Texas, No. 6003

As stated above, the plaintiff Surety Company was the surety on the official bond of Gibson Gayle, Tax Collector. It guaranteed his faithful performance of his duties as such.

Article 6003 of the Revised Civil Statutes of Texas before its amendment by the Acts of 1935, read as follows:

> "No official bond shall be void upon first recovery, but may be sued upon in separate actions until exhausted."

By amendment adopted in 1935, this statute was made to read:

> "No official bond **or any State, county or precinct officer** shall be void upon first recovery but may be sued upon **by the party injured** in separate actions unil exhausted."

Petitioner contended that it was entitled to the benefit of this statute and that in case it was injured by any

misfeasance of Gibson Gayle, Tax Collector, in connection with his official accounts, it would be entitled to recover from Gibson Gayle and **from his said surety.** It further contended that **if** it had a right to recover **from the surety,** obviously the **surety could not be entitled to recover from it.**

Dealing with these contentions, C.C.A. 5 in its opinion, page 10 (R. p. 171) said:

> "The bond in the present case was given by the tax collector to insure faithful performance of his duties to the state and its departments. It was not, primarily at least, for the benefit of the appellant depository. Recoveries thereon can be had by those only who are either expressly or by necessary implication included as obligees. The Act of the Texas legislature authorizing suits upon official bonds 'by the party injured' did not become effective until August 9, 1935, some seven months after the last term of office of the tax collector had expired; so that we must determine the rights of the bank in this case by the provisions of Article 2549 above quoted."

This holding, we submit, was in **direct and flagrant conflict** with the Texas law. That law has been clearly laid down by the Texas courts in the cases of *Bordelon v. Philbrick, et als.*, 84 S. W. (2) 710, and *Tabor v. McKenzie*, 49 S. W. (2) 874.

An analysis of these two cases is as follows:

BORDELON vs. PHILBRICK, 84 S. W. (2d) 710.

Commission of Appeals of Texas, Section A. Opinion adopted by the Supreme Court of Texas, June 26th, 1935.

Philbrick as principal and National Surety Company as surety signed this bond on November 30th, 1928,

running to the "Governor of Texas, Austin, Texas and his successors in office". The condition of the obligation was that Philbrick should "faithfully perform and discharge all the duties required of him by law as constable aforesaid". Bordelon, a third person injured, sued on the bond in the name of the State. After stating, p. 711, that the Court of Civil Appeals had disposed of the case upon the sole proposition that an injured third party had no right of action upon the bond, the opinion, p. 712, reads:

> "It will be observed that the provision that the bond be payable to the Governor and his successors in office, and the further provision that **the same may be sued upon from time to time in the name of the party injured until the whole amount thereof is recovered,** are omitted from said article as adopted in 1925. Upon the theory that a third party has no right to sue upon such obligation without legislative authorization the Court of Civil Appeals held that the omission of the language above mentioned took away the right of the injured third party to maintain an action upon the bond. 53 S. W. (2d) 94."

The opinion of the court continues as follows:

> "We call attention to the fact that a portion of what was formerly this article (6881) is now Article 6003 of the revised statutes of 1925, which is as follows:
>
> " 'No official bond shall be void upon first recovery but may be sued upon in separate actions until exhausted.' "

The Court continues at line 5 of [2] p. 712:

> "We have no hesitancy in holding that regardless of whether the bond should have been made payable to the Governor or to the County Judge, it was intended for the use and benefit of

all persons who might be injured or affected by the failure of the constable to faithfully perform and discharge all duties required of him by law. Citing Boward v. United States, Use of Stewart, 184 U. S. 676; 46 L. Ed. 754."

TABOR vs. McKENZIE, 49 S. W. (2) 874.

This case was decided by the Court of Civil Appeals for the Eleventh District on April 21, 1932, and involves the identical question of whether or not a third party injured would have the right to sue on a bond during the time when this statute did not include the words "by any party injured." In this case the bond was a sheriff's bond and plaintiff was a citizen who had been shot by a deputy sheriff seeking to arrest him.

The writ of error table shows no action on this case by the Supreme Court.

On page 876 [3] the Court says:

"Said surety contends in this connection that an action can be maintained on any official bond by one not named therein only when the right to do so is conferred by statute, either in express terms or by necessary intendment, and that no such statute existed at the time appellant's cause of action arose, nor at the time of trial. The identical issue presented by such contention was considered by the Circuit Court of Appeals for the United States for the Fifth Circuit in the case of Bracken vs. Cato, 54 F. (2d) 457, 458."

* * * * *

"We quote from the opinion in that case as follows:

" 'Prior to the revision of the statutes of Texas in 1925, it was provided that a sheriff's bond "shall not be void on the first recovery, but may be sued on from time to time in the name of any person

> injured until the whole amount thereof is recovered." Revised Civil Statutes of 1911, art. 7121. In the Revision of 1925, that article was retained as Article 6866 but there was omitted from it the language just quoted. However, a separate provision was inserted as Article 6003, which reads: "No official bond shall be void upon first recovery but may be sued upon in separate actions until exhausted." There was thus omitted in the revision of 1925 nothing of substance except the words "in the name of any person injured"; but those words were restored in 1931. It is true, therefore, that at the time this suit was brought there was **no express statutory authority for bringing it in the name of the plaintiffs. But we are of the opinion that none was necessary.** * * * "

Continuing, the Texas Court said:

> "We think that a right in any person suffering such injury to seek redress therefor by action on such official bonds is given or recognized by necessary intendment in the several articles hereinbefore referred to bearing on such issue in the Revised Statutes as they existed at the time appellant sustained his injuries. The contention of the surety is therefore overruled." (Emphasis ours).

Compare *Howard v. The United States*, 184 U. S. 676; 46 L. Ed. 754. *Bracken vs. Cato*, 54 F. (2d) 457.

We respectfully submit that a comparison of the language used by the C.C.A. (R. p. 171) quoted *supra*, with the language used by the courts of Texas in the *Bordelon* and *Tabor* cases, quoted *supra*, conclusively demonstrates that the Court of Appeals has **"decided an important question of local law in a way in conflict with applicable local decisions,"** and since the question at issue is a question which not only affects this

litigant, but affects every bank in the State of Texas, which is a depository, a certiorari should be issued herein for the purpose of correcting the error.

C.C.A. 5 has itself expressly held:

American Surety Co. v. Robinson, 53 F. (2) 22:

> "But this would never happen when such third party if held liable in the first place would have recourse over on the principal and his surety. The existence of such a right of recourse against the surety necessarily makes the surety's equity as inferior and subordinate."

PETITION V, POINT 5

Petitioner has Accounted for all of Gayle's Withdrawals

Petitioner is well aware of the fact that the Supreme Court of the United States, on application for certiorari will not concern itself with questions of fact. However, in order to show how **equitable** is its position, it makes the following recitation:

In the trial court in each trial the parties agreed (R., p. 89) and the Court found (R., p. 40) that Gayle earned fees and commissions aggregating $93,839.33 exclusive of motor vehicle license fees. Under Article 7250, upon which the Bonding Company entirely predicates its suit, the depository was authorized to pay commissions to the tax collector as shown by his approved reports. Article 7250 does not in any manner designate the party or parties who shall approve these reports. The record shows affirmatively and without contradiction (R., p. 80, lines 19 to 23) that the auditor of McLennan County checked them and found them to be correct. It also shows that the County clerk of McLennan County examined his

monthly reports, compared them with the stubs found in his office and found them correct. (R., p. 90). See opinion, p. 7. (R. p. 168).

There are two decisions by Courts of Civil Appeals of Texas. One holds that the county auditor's audit of the tax collector's account is sufficient approval to satisfy the provisions of Article 7250 with respect to the approval of the tax collector's fees and commissions. The other holds that the Commissioner's court of the county must do this checking and auditing. A writ of error was dismissed in each of these decisions. The case of *American Indemnity Company v. Red River National Bank*, 132 S. W. (2d) 473, Par. 4, provides that a check of these accounts by the county auditor is sufficient. The case of *New Amsterdam Casualty Company v. First National Bank of Gilmer*, 134 S. W. (2d) 470, requires the approval of the commissioner's court.

The C.C.A. in deciding this case has chosen to rely on the decision of the *New Amsterdam Casualty Company v. The First National Bank*, and **has not referred to or cited the other case.** Relying upon it, the Court condemns the Bank as a malefactor, a conspirator. Surely the Bank should not be so condemned for doing what a high court of Texas has held to be legal, in a decision which the Supreme Court of Texas refused to review.

Moreover, we submit that, especially in a court of equity in which the equities of the respective parties are measured, the reasoning in the case of *American Indemnity Company v. Red River National Bank* is much more sound, reliable and equitable. The Texas Courts have pointed out that a county commissioner's court is composed either wholly or partially of farmers and men who are not experienced in auditing and checking tax collector's accounts. For this statement we refer this Court

to the language in the opinion in the above case, which follows:

> "From the qualifications required of him it is apparent that an examination and approval by the County auditor of the tax collector's reports would better protect the interest of the county than would such an audit and approval by the commissioners court composed of men not required to be qualified in the matter of auditing reports and accounts, and that such was the purpose and intent of the statute in requiring the appointment of a person so qualified as County auditor. He is by the statute made the officer of the county in which is vested the authority and it is made his duty to examine and if found correct to approve the tax collector's reports and stamp his approval thereon. Hence, his approval of the reports is an approval by lawfully constituted authority. It will be here noted that Article 7250 under which plaintiff seeks to hold the depository liable does not prescribe by whom the reports should be approved before the depository may permit the tax collector to withdraw his commissions 'as shown by his approved reports.' We do not think that a depository is liable under the provisions of Article 7250 for having permitted the tax collector to withdraw his commissions, when such depository has in *good faith* permitted withdrawal of only such commissions as were shown by the tax collector's reports approved by the County auditor."

On page 89 of the Record, the following statement by Counsel for the plaintiff occurs:

> "If your Honor please, solely for the purpose of saving the record and at the request of counsel for the defendant, it is in Open Court agreed that Gayle earned and was entitled to retain from taxes, as they are defined in paragraph 19 (R.P. 59) of the stipulation filed in this case on Novem-

ber 30, 1937, and redemption fees collected by him, the sum of $93,839.33."

Petitioner therefore says that in all justice, it should have a credit for this item of the Tax Collector's fees and commissions which were approved and checked by the County Auditor and the Clerk of the County Court in the sum of $93,839.33.

Petitioner moreover points out that it is entitled to credit for the $14,562.56 which Gayle withdrew from his account with petitioner in order to make good the shortage for which both he and the Bonding Company were liable in the Highway Account.

Petitioner moreover points out that the trial court (R. p. 40, Finding 13) and the appellee Bonding Company in its brief in the Circuit Court of Appeals (pp. 13, 14 and 16) admitted that they were deposited in Gayle's account an aggregate of $23,877.66, which were not in the form of taxes. Since this amount was not deposited in the form of taxes, the petitioning bank should under no circumstances be compelled to account for it as taxes. Petitioner's contention, therefore, is that even though by law not compelled so to do, it has fully accounted for all of the moneys included in the item of $131,199.36 which it has been claimed that it should account for in the following manner:

(a) Fees and commissions due Gibson Gayle $93,938.36

(b) Moneys withdrawn and checked to Highway Account and paid to the State and County, which payments would otherwise have been short and the Bonding Company liable therefor in the sum of $14,562.56

(c) Moneys which were deposited in the Depository which were not tax money in the sum of $23,877.66

In this connection, petitioner moreover points out that from Record, pp. 84 and 87, it appears that Gibson Gayle failed entirely to deposit $39,351.95 in taxes in his depository account, and there would appear to be no reason whatever why it should be assumed that the $52,000 which was embezzled by Gayle was the $52,000 deposited in and thereafter withdrawn from the bank. On the contrary, the natural inference is that Gayle embezzled the $39,351.95 which he never deposited in his official depository, as he was required by law to do.

For all of which reasons, it is respectfully submitted, a writ of certiorari should issue herein to correct the decision below which involves a point of wide public interest, one involving every bank in Texas which is the depository of public funds and which important question of local law has been decided in a way plainly in conflict with applicable local decisions.

THE CITIZENS NATIONAL BANK OF WACO, TEXAS,

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March, 1941.

ADDENDA

For the convenience of the Court certain Texas statutes, or pertinent parts thereof, are set out below. These Articles are referred to at page 7, et seq. of Appellant's Petition and page 16 of the Brief. All emphasis by present writers.

ARTICLE 2535. Remittances.

> "All State depositories shall remit free of charge to the Treasurer on his demand, all withdrawals of State funds as provided for in the preceding article. All remittances to the Treasurer made by the State or reserve depositories, or any person or persons may be in cash by registered letter, by post office money order, express money order of any company authorized to do business in Texas, or by any bank draft on any bank in the following cities; Dallas, Fort Worth, Waco, Houston, Austin, Galveston and San Antonio. The liability of any reserve depository, State depository or person sending the same shall not cease until the said money is actually received by the Treasurer. Any depository that refuses to remit for State items, or Treasury drafts, as above indicated, shall upon order of the Board forfeit its right to receive further deposits, and the Board shall have the right to withdraw all funds from said bank, which shall thereafter cease to be a State depository."

ARTICLE 2549. Designating depository.

> "As soon as said bond be given and approved by the Commissioners' Court, and the Comptroller, an order shall be made and entered upon the minutes of said Court designating such banking corporation, association or individual banker, as a depository for the funds of said county until sixty days after the time fixed for the next selection of

a depository; and, thereupon, it shall be the duty of the county treasurer of said county, immediately upon the making of such order, to transfer to said depository all the funds belonging to said county, as well as all funds belonging to any district or other municipal subdivision thereof not selecting its own depository, and immediately upon receipt of any money thereafter, to deposit the same with said depository to the credit of said county, district and municipalities; and, for each and every failure to make such deposit, the county treasurer shall be liable to said depository for ten per cent upon the amount not so deposited, to be recovered by civil action against such treasurer and the sureties on his official bond in any court of competent jurisdiction in the county. It shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository or depositories, as soon as collected, pending the preparation of his report of such collections and settlement thereon, which shall bear interest on daily balances at the rate, if any, fixed for such deposits on the tax collector by the Commissioners' Court in its order designating such depository or depositories, and the interest accruing thereon shall be apportioned by the tax collector to the various funds earning the same. The bond of such county depository or depositories shall stand as security for all such funds. If the tax collector of such county shall fail or refuse to deposit tax money collected as herein required, he shall be liable to such depository or depositories for ten per cent upon the amount not so deposited and shall in addition be liable to the State and county and its various districts and other municipal subdivisions for all sums which would have been earned had this provision been complied with, which interest may be recovered in a suit by the

State. Upon such funds being deposited as herein required, the tax collector and sureties on his bond shall thereafter be relieved of responsibility for its safekeeping. All money subject to the control of the county treasurer or payable on his order, belonging to districts or other municipal subdivisions selecting no depository, are hereby declared to be 'county funds' within the meaning of this chapter and shall be deposited in accordance with its requirements and shall be considered in fixing the amount of the bond of such depository. (Acts 1905, P. 393, as amended Acts. 1917, p. 19; Acts 1933, 43rd. Leg. p. 604, ch. 201)."

ARTICLE 3891.

"Each officer named in this Chapter **shall first out of the current fees of his office pay or be paid the amount allowed him under the provisions of Article 3883, together with the salaries of his assistants and deputies, and authorized expenses under Article 3899, and the amount necessary to cover costs of premium on whatever surety bond may be required by law.** If the current fees of such office collected in any year be more than the amount needed to pay the amounts above specified, same shall be deemed excess fees, and shall be disposed of in the manner hereinafter provided." . . .

Under the above Article, the tax collector is authorized to pay the premiums on surety bond required of him or his deputies under the law and the other items listed. These would necessarily have to be paid out of the depository account.

ARTICLE 3898.

"A fiscal year, within the meaning of this chapter, shall begin on January first of each year; and each officer named in Article 3883 shall file the reports and make the settlement required in

this chapter on January first of each year. Whenever such officer serves for a fractional part of a fiscal year, he shall nevertheless file his report and make settlement for such proportional part of the maximum allowed as the time of his service bears to the entire year. However, an incoming officer elected at the general election, who qualifies prior to January first next following, shall not be required to file any report or make any settlement before January first of the following year; but his report and settlement shall embrace the entire period dated from his qualification. (Acts. 1923 P. 223)."

ARTICLE 6675 3b (A) repealed by the 45th Legislature, Acts 1937, page 1324, Ch. 489, Par. 1.

"If any motor vehicle be registered in Texas for any current year, and license fee paid thereon for such year, and such vehicle shall be destroyed and demolished to such an extent that the same cannot thereafter be used upon the highways of this State, the owner thereof may take the license fee receipt, together with the license plates for such vehicle, to the Tax Collector or such officer issuing the same, and **said officer shall,** upon satisfactory proof being given of such destruction and demolishment, **refund the fee** paid thereon representing the full months during which said vehicle will not be used, but no refund shall be made for the fractional part of any month."

The Court will note in this statute it is expressly provided that the tax collector shall "refund the fee paid thereon."

ARTICLE 7141.

"For the services performed under the provisions of this chapter, the County Judge shall be allowed two (2) per cent of the taxes collected, not

to exceed Thirty ($30.00) Dollars in any one estate. If suit be brought, the county or district attorney prosecuting same shall receive as compensation therefor, five (5) per cent on the amount of taxes payable hereunder, not to exceed in any one case the sum of Two Hundred ($200.00) Dollars, which fee shall be added to and collected from said estate in addition to the taxes and penalties herein provided for, and such compensation shall be in addition to all other fees and compensation provided by this law. The aggregate of fees received under this law shall not exceed in any one year Two Thousand ($2000.00) Dollars, and any fees earned in addition to said sum shall be considered a portion of the tax and penalties collected, and be distributed in the same manner. Acts 1923, 2nd C. S., p. 63; Acts 1933, 43rd. Leg., p. 581, ch. 192, par. 2b (par. 19)."

ARTICLE 7142.

"The collector of taxes of each county shall, on or before the fifteenth day of each month, transmit to the State Treasurer at Austin, Texas, all taxes received before the first day of the month by him under the provisions of law relating to the assessment and collection of inheritance taxes, **deducting therefrom all lawful disbursements made by him under the law and also his compensation** at the rate of One ($1.00) Dollar, for each estate on which he collected the inheritance tax. Acts 1923, 2nd. C. S. p. 63; Acts 1933, 43rd. Leg. p. 581, ch. 192, #2b (#17)."

In connection with the above Article we set out ARTICLE 7132, reading as follows:

"All taxes collected under this law by any executor, administrator or trustee, shall be paid by him to the tax collector of the county whose county court has jurisdiction of the estate of the decedent.

Upon such payment, the collector shall make duplicate receipts thereof and shall deliver one to the party making payment, the other he shall send to the Comptroller, who shall charge the collector with the amount thereof and shall countersign and affix his seal to such receipt and transmit same to the party making payment. Acts 1923, 2nd. C. S., p. 63."

From the above it will be seen that all inheritance taxes are to be paid to the tax collector of the county, and therefore the fees specified under Article 7141 must be paid by the tax collector out of his tax depository account.

ARTICLE 7249a provides as follows:

"On Monday of each week each tax collector shall pay over to the County Treasurer ninety percent of all taxes collected for the county during the preceding week and pay over to the State Treasurer ninety percent of all taxes collected for the State during the preceding week.

"The Commissioners Court of any county or the Comptroller of Public Accounts may at any time within their discretion call upon the tax collector for a sworn statement as to the amount of his collections made during the current month and for a report as to the county taxes in the county depository belonging to the county or State, and **direct** that ninety per cent of those funds be transferred to the county or state, treasurer .... Failure or refusal of the tax collector to make remittances provided in this act within three (3) days from the date or to render statements required herein within three days after receiving notice to do so, shall constitute a misdemeanor and shall be punished by a fine not to exceed $200.00."

ARTICLE 7250. Depository shall pay treasurer.

"Except as to compensation due such tax collector as shown by his approved reports, tax money deposited in county depositories shall be paid by such depositories only to treasurers entitled to receive the same, on checks drawn by such tax collector in favor of such treasurer. Acts 1876, p. 260; Act 1915, p. 190; Acts 1917, p. 354; G. L. vol. 8, p. 1096."

ARTICLE 7264 reads as follows:

"The allowance of an insolvent list to the collector in accordance with the provisions of the preceding article shall not absolve any tax payer or property thereon from the payment of taxes; but the collector shall use all necessary diligence to collect the amounts due on the insolvent list after it is allowed, and report **and pay over to the proper officers** all amounts collected on the same. ID."

Under Article 7264 the **collector is to collect the delinquent taxes and pay over to the proper officers all amounts collected on same.** Under Article 7264a an expenditure is authorized for the preparation of the plat books payable out of such delinquent taxes. This would necessarily have to be paid by the tax collector out of his depository account.

ARTICLE 7264a.

"Sec. 1. It is hereby declared the policy of the State to adjust delinquent taxes, correct errors, to eliminate conflicts in surveys of land, and to collect the delinquent, occupation, franchise, and Ad Valorem Taxes, in order to clear this State of such taxes, errors and conflicts at the earliest date possible, and to provide a system for assessors, in

order to eliminate the numerous errors that now appear on the tax rolls each recurring year.

"Sec. 2. Cost of collecting delinquent taxes shall not exceed the amount of the penalty and interest, or any amount equal to such penalty and interest of all delinquent taxes collected. Any county desiring to install a tax or plat system and clear the county of errors, conflicts and unknown owners, may do so by paying not to exceed 15% of the delinquent taxes collected, which payment shall cover the cost of records and installing same.

"Sec. 3. In order to speedily carry out the provisions of this Act, the State Comptroller and the Commissioners' Court of each of the several counties may employ competent persons to do the work and to furnish the Comptroller and the Commissioners' Court of all cases where adjustment is necessary; and in all such cases the Commissioners' Court shall make proper settlement or adjustment.

"Sec. 4. This act is not intended to change any law now in effect regarding the collection of delinquent taxes, but to be an aid to the officials in the discharge of their duties, and when the delinquent taxes in a county are adjusted, corrected and collected, the Comptroller shall take necessary steps to see that all delinquent taxes are collected within a reasonable time after they become delinquent, in order to avoid the necessity of again employing additional help. Acts. 1931, 42nd. Leg. p. 383, ch. 229."

ARTICLE 7285.

"Each tax collector to whom payment is made under the provisions of this Chapter shall give a receipt therefor, signed by him officially in the presence of two witnesses; which receipt when duly recorded, shall be notice to all persons that the land therein described has been redeemed; **and said collector shall on demand pay over to the pur-**

chaser at said tax sale the money thus received by him."

Obviously the moneys received by the tax collector for the redemption of property are received by him in his official capacity and are to be deposited in the depository and can only be paid out by check drawn on the depository. The statute makes it the collector's duty to pay such checks.

ARTICLE 7294 provides:

> "All tax collectors and other officials or appointees authorized to receive public monies shall account for all moneys in their hands belonging to the State and pay the same over to the State treasurer whenever and as often as he may be directed to do so by the Comptroller."

ARTICLE 7296 provides:

> "The notification and direction provided for in the two previous articles may be verbal, written or by telegram . . . ."

ARTICLE 7332.

> "The County or District Attorney shall represent the State and County in all suits against delinquent tax-payers, and all sums collected shall be paid over immediately to the County Collector.
>
> "Before filing suits for the recovery of delinquent taxes for any year, notice shall be given to the owner or owners of said property as is provided for in Article 7324 of the Revised Civil Statutes of Texas, 1925, as amended by Chapter 117, page 196, Acts of the Forty-second Legislature, Regular Session. The fees herein provided for shall not accrue to nor shall the various officers herein named be entitled thereto in any suit unless

it be proved that notice has been given to the owner for the time and in the manner provided by law.

"In all cases, the compensation of said Attorney shall be Two ($2.00) Dollars for the first tract and One ($1.00) Dollar for each additional tract up to four (4), but said fee in no case to exceed Five ($5.00) Dollars. And provided, that in any suit brought against any individual or corporate owner, all past due taxes for all previous years on such tract or tracts shall be included; and provided, further that where there are several lots in the same addition or subdivision delinquent, belonging to the same owner, all said delinquent lots shall be made the subject of a single suit.

"All fees provided for the officers herein shall be treated as fees of office and accounted for as such, and said officers shall not receive nor retain said fees in excess of the maximum compensation allowed said officers under the laws of this State; and provided further that the County Attorney, Criminal District Attorney or District Attorney shall not be entitled to the fees herein provided for in instances where such delinquent taxes are collected under contracts between the Commissioners' Court and others for the collection of such taxes, and in such instances the fees herein provided for such officers shall not be assessed nor collected.

"The Sheriff or Constable of the County in which the suit is pending shall receive a fee of Two ($2.00) Dollars in each case which will cover the service of all process, and the selling of the property and executing deeds for same. If, in any of such suit, process is issued to be served in Counties other than the one in which the suit is pending, the Sheriff or Constable serving the same shall receive a fee of One ($1.00) Dollar in each suit for his services.

"The District Clerk shall receive a fee of Two ($2.00) Dollars in full for his services in each case.

"The County Clerk shall receive One ($1.00)

Dollar in full for his services in each case.

"Provided, that the fees herein provided for in connection with delinquent tax suits shall constitute the only fees that shall be charged by said officers for preparing, filing, instituting, and prosecuting suits on delinquent taxes and securing collection thereof, and all laws in conflict herewith are hereby repealed.

"In case the delinquent tax-payer shall pay to the collector the amount of delinquent taxes for which he is liable, together with accrued interest after filing of suit before judgment is taken against him in the case, only one-half of the fees taxable in such a case, as provided herein, shall be charged against him.

"Sec. 2. In suits by Counties against any of the officers herein named to recover moneys or fees collected by such officers, limitation of action shall not apply, and no such suit shall be barred by the Statute of limitation. Acts 1923, 3rd. C. S. p. 182; Acts 1929, 41st. Leg. p. 307, ch. 143, Par. 1; Acts 1930, 41st. Leg., 4th C. S. p. 30, ch. 20, Par. 9; Acts 1931, 42nd. Leg. p. 428, ch. 258, Par. 1; Acts 1931, 42nd. Leg., 2nd. C. S. p. 31, ch. 16."

ARTICLE 7333.

"In each case such fees shall be taxed as costs against the land to be sold under judgment for taxes, and paid out of the proceeds of sale of same after the taxes, penalty and interest due thereon are paid, and in no case shall the State or county be liable therefor. Acts 1923, 3rd. C. S. p. 182."

It will be noted that the above Articles provide that all sums collected from delinquent taxpayers, including the fees of the officers therein specified, are to be paid to the Collector. The Article also provides a fee which various officers are to receive out of these de-

linquent collections. It was the Collector's duty to deposit all such taxes and fees in the depository and he could only pay them out by checks drawn on the depository.

ARTICLE 7335.

"Whenever the commissioners' court of any county after thirty days' written notice to the county attorney or district attorney to file delinquent tax suits and his failure to do so, shall deem it necessary or expedient, said court may contract with any competent attorney to enforce or assist in the enforcement of the collection of any delinquent State and County taxes for a per cent on the taxes, penalty and interest actually collected, and said court is further authorized to pay for an abstract of property assessed or unknown and unrendered from the taxes, interest and penalty to be collected on such lands, but all such payment and expenses shall be contingent upon the collection of such taxes, penalty and interest. It shall be the duty of the county attorney, or of the district attorney, where there is no county attorney, to actively assist any person with whom such contract is made, by filing and pushing to a speedy conclusion all suits for collection of delinquent taxes, under any contract made as herein above specified; provided that where any district or county attorney shall fail or refuse to file and prosecute such suits in good faith, he shall not be entitled to any fees therefrom, but such fees shall nevertheless be collected as a part of the costs of suit and applied on the payment of the compensation allowed the attorney prosecuting the suit, and the attorney with whom such contract has been made is hereby fully empowered and authorized to proceed in such suits without the joinder and assistance of said county or district attorneys. Acts 2nd C. S. 1923, p. 37; Acts 3rd C. S. 1923, p. 182."

ARTICLE 7335a.

"Sec. 1. No contract shall be made or entered into by the Commissioners' Court in connection with the collection of delinquent taxes where the compensation under such contract is more than fifteen per cent of the amount collected. Said contract must be approved by both the Comptroller and the Attorney General of the State of Texas, both as to substance and form. Provided however the County or District Attorney shall not receive any compensation for any services he may render in connection with the performance of the contract or the taxes collected thereunder.

"Sec. 2. Any contract made in violation of this Act shall be void. Acts. 1930, 41st. Leg., 4th. C. S. p. 9, ch. 8."

These delinquent taxes are to be paid to the tax collector and consequently the payment for the collection of these delinquent taxes would have to be made by him out of his tax depository account.

ARTICLE 7336f.

"Section 1. The collection of all delinquent, ad valorem taxes due the State, County, Municipality or other defined Subdivision that were delinquent prior to December 31st, 1919, is forever barred.

"Section 2. Any County having as many as two years' taxes delinquent which have not been included in the delinquent tax record, the Collector of taxes shall within two years from the effective date of this Act, cause to be compiled a delinquent tax record of all delinquent taxes not barred by this Act; the delinquent record shall be examined by the Commissioners' Court and the Comptroller or governing body, corrections may be ordered made, and when found correct and approved by them, payment for the compilation thereof shall

be authorized at actual cost to the Tax Collector, proportionately from each the State and County taxes, or municipal taxes, first collected from such record, such cost in no case to exceed a sum equal to five (5c) cents per item or written line of the original copy of such record and in no event shall any compiling cost be charged to the taxpayer. The delinquent tax record when approved, shall be prima facie evidence of the delinquency shown thereon, and when there shall be as many as two years of delinquency accumulated which are not shown on the record, a recompilation, or a two year supplement thereto shall then be made as herein provided. Tax Collectors shall cause to be compiled like records of taxes delinquent due any district for which they collect from tax rolls other than the State and county rolls, and when approved by the governing body of the particular district, **the cost of same shall be allowed in the manner herein provided.** Acts 1935, 44th. Leg. p. 355, ch. 128."

FILED
APR 15 1941
CHARLES ELMORE CROPLEY
CLERK

No. 915

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

THE CITIZENS NATIONAL BANK OF WACO, TEXAS

Petitioner,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

RESPONDENT'S OPPOSING BRIEF

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HICKS PRINTING CO.--DALLAS

INDEX

Pages

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

ARGUMENT 5

CITATIONS

Austin v. Kiser, 277 S. W. 411 16

Bordelon v. Philbrick, 84 S. W. (2d) 710 14

Central National Bank of Baltimore v. Conn. Mut. Life Ins. Company, 104 U. S., 14 Otto, 54, 26 L. ed. 693 16

Clough v. Worsham, 74 S. W. 350 13

Clyde Equipment Co. v. Fiorito, et al., 16 Fed. (2d) 106 8

Daniels v. Wight, 249 S. W. 454 8

Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865 9

Fidelity & Casualty Co. v. Farmers Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833 ..... 8, 9, 17, 19

Fidelity & Deposit Co. of Md. v. Farmers' Bank, 44 Fed. (2d) 11 14

First Nat. Bank v. Farrell, 272 Fed. 371 8

First Nat. Bank of Chicago v. Newhouse, 17 Fed. (2d) 228 15

G. C. & S. F. Ry. Co. v. Donahoo, 59 Tex. 128 9

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607 9

Leather Manufacturers Nat. Bank v. Merchants Nat. Bank, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. ed. 342 19

Linscott v. Fidelity & Deposit Co. of Maryland, 145 Pac. 868 15

Mahon v. Kinney County, 28 S. W. 1024 13

Pages

Maryland Casualty Company v. City Nat. Bank, 29 Fed. (2d) 662 16
McRea v. McWilliams, 58 Tex. 328 ..... 13, 14
Moody v. Megee, 31 Fed. (2d) 117 13

New Amsterdam Casualty Company v. First National Bank of Gilmer, 134 S. W. (2d) 470 ..... 18, 19

Quanah A. & P. Ry. Co. v. Wichita Bank & Trust Co., 127 Tex. 407, 93 S. W. (2d) 701 12

State v. Harvey, 15 S. W. (2d) 82 16

Tabor v. McKenzie, 49 S. W. (2d) 874 14

United States v. Nat. Bank of Commerce, 205 Fed. 433 19
United States v. National Surety Corporation, 309 U. S. 165, 84 L. ed. 677 13

Watson v. El Paso County, 202 S. W. 126 19
Wyatt & Wingo v. White, 228 S. W. 154 8

Statutes:
Acts of 1935, p. 657, Chap. 270 14

Revised Civil Statutes of Texas, 1925:
Art. 2535 9
Art. 2549 17
Art. 3891 10
Art. 3898 10
Art. 3937 11
Art. 3938 11
Art. 6003 14
Art. 6675-a-3b 10, 11
Art. 7132 10
Art. 7141 10
Art. 7142 10
Art. 7247 13
Art. 7250 ..... 10, 11, 17
Art. 7260 ..... 10, 17
Art. 7261 ..... 10, 17

Pages
Art. 7264 10
Art. 7264-a 10
Art. 7285 10
Art. 7331 9
Art. 7332 9
Art. 7333 9
Art. 7335 10
Art. 7335-a 10
Art. 7336-f 10

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RESPONDENT'S OPPOSING BRIEF

OPINIONS BELOW

There was no opinion delivered by the District Court except as contained in the Findings of Fact, (R. 36), the Conclusions of Law (R. 41), and the Judgment (R. 45).

The opinion delivered by the Circuit Court of Appeals is reported in 117 Fed. (2d) at page 852.

The opinion delivered by the Circuit Court of Appeals on former appeal is reported in 100 Fed. (2d) at page 807, and (rehearing) 101 Fed. (2d) at page 974, with respect to which certiorari was denied May 1, 1939 (303 U. S., 626, 59 S. Ct. 827, 83 L. ed. 1509).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 13, 1941 (R. 174). Petition for rehearing was filed January 29, 1941 (R. 175), and denied March 8, 1941 (R. 180). Petition for certiorari was filed April ...., 1941, and jurisdiction is invoked under 28 U. S. C. A., Sec. 347 (a), (Sec. 240 of the Judicial Code as amended) on the alleged ground that the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions", with respect to a matter of alleged "wide public interest".

STATEMENT OF THE CASE

Respondent brought the suit against petitioner to recover a loss of $52,268.39 sustained by respondent as surety for Gibson Gayle, as Tax Collector, alleging that, of deposits on account of taxes made by him with petitioner, as County Depository, and by it credited to him as Tax Collector, they, and each of them, failed to account, according to law, for that sum; that, on the contrary, petitioner, in violation of statute, undertook to charge against the credits on account of the deposits amounts aggregating that sum that did not represent "payments to treasurers entitled to receive the same", or his compensation "as shown by his approved reports", or payments for any purpose authorized by law; that, on account thereof, he and petitioner and respondent, and

each of them, were obligated to pay the State $52,500; that respondent, as surety, paid the same under compulsion, and thereby satisfied their indebtedness, and became subrogated to the rights of the State, and thereupon demanded payment thereof from petitioner (R. 1-6).

Petitioner, by its answer, denied that it had failed to account, or was liable, for anything, and asserted that all sums credited by it on account of taxes deposited had been duly accounted for by it by payment of checks drawn by the Tax Collector, as such, and covering payments to treasurers, and for other purposes, including his commissions and fees, as shown by his monthly reports audited by the County Auditor, and approved by the County Clerk, and alleged that, of payments thus made to him, he deposited $18,603.45 in another bank to cover a shortage in his highway fund account; that respondent would otherwise have been liable for that shortage; that respondent had been surety for Gayle's predecessor; that both respondent and the State knew of the way in which the funds were being handled; that respondent had made no objection thereto; that Gayle, with acquiescence of the State, had failed to make payments weekly, as required by statute; that it had been customary for petitioner, and other depositories, to make payments on the signature of the collector, without more (R. 6-20).

The stipulated facts (R. 48-63) show, and the trial court found (R. 39, p. 10) that petitioner charged against deposits credited to the Tax Collector, as such, sums aggregating $131,199.36, on account of checks drawn by, and payable to, him, but not covering his compensation "as shown by his approved reports" (none having been approved by the Commissioners' Court, R. 59, Par. 18);

that (R. 38, Par. 9), of the credits on account of deposits received by petitioner, it (as well as Gayle) failed to account for $52,268.39, and that (R. 39, Par. 10) against the deposits received by petitioner, it "paid to, and for the account of, Gibson Gayle, sums aggregating $131,-199.36, and charged the same against" the credits therefor "when his reports had not been approved by the Commissioners' Court", and that (R. 39, Par. 11) "while he made true and correct reports of all taxes collected by him * * * none of them, or any statement of the disposition thereof made by him, was ever approved by the Commissioners' Court".

While the court also found that (R. 40, 41, Par. 14) petitioner did not participate in Gayle's embezzlement, or have any knowledge of the shortage which resulted therefrom, or receive any benefit from his default, it concluded that (R. 43, Par. X) "defendant (petitioner) participated in Gayle's breach of trust on account of which, and their violations of contracts, and of law, and the consequent damage to complainant (respondent), it is entitled to recover from defendant (petitioner) the sum of $52,268.39", with interest.

We do not assert that petitioner applied to its own use any of the money that was, as against the deposits, by it wrongfully paid to Gayle, and by it wrongfully charged against the credits on account of the deposits, but we do assert that petitioner did participate in the default that caused the loss; and since the stipulated facts and findings and conclusions show that petitioner, by its wrongful acts, did participate therein, and that, but for its participation, the loss could not have occurred, we deny any implication to the contrary that may be suggested by petitioner's statement of the case (P. 2, Par. III.).

ARGUMENT

Petitioner contends (P. 8-10):

(1) That it did not participate in Gayle's shortage.

(2) That by statute it was authorized to make the charges on account of the payments made by it to Gayle on account of the checks drawn by, and payable to, him, and that it therefore is in the attitude of a depository for a trustee, for payments to whom it should not be held unless it received a benefit therefrom.

(3) That there was evidence sufficient to show a shortage of $14,562.56 in Gayle's highway fund account in another bank; that it was covered by the payments wrongfully made and charged by petitioner; that, otherwise, respondent would have been liable therefor; and that therefore petitioner is entitled to credit for that amount.

(4) That the bonds executed by respondent inured to petitioner's benefit; that, therefore, if petitioner had paid the loss to the State that arose from petitioner's and Gayle's default, it would be entitled to recover the same from respondent; and that, therefore, the judgment for respondent against petitioner is erroneous; and

(5) That petitioner had the right to permit Gayle to withdraw his commissions, and that it is entitled to credit therefor.

Petitioner presents no point relating to anything of substance; nor does it show that the Circuit Court of Appeals has decided any question of local law in a way probably in conflict with applicable local decisions.

Petitioner's Point 1 relates to nothing of substance because it is immaterial whether or not petitioner knew

of Gayle's shortage, or participated in his default by receiving a part of the proceeds thereof for its own use, or otherwise received a benefit therefrom, since its liability is based on its violation of statute in making unauthorized payments and charges therefor.

The District Court found that (R. 38, Par. 9):

> "Pursuant to statute requiring the Tax Collector to deposit all taxes collected by him in such depository as soon as collected, Gibson Gayle deposited with defendant, and received credit for, sums aggregating $4,468,250.45, including depository interest in the sum of $3,097.25, on account of taxes collected by him, of which he and it failed to account, according to law, for the sum of $52,268.39, which it paid to, or for the account of, Gibson Gayle, on checks not payable to treasurers entitled to receive the same or covering his compensation as shown by his approved reports, on account of which complainant, solely by reason of said bonds executed by it as surety for Gibson Gayle, as Tax Collector, became obligated to, and did, on the 9th day of November, A. D., 1935, pay $52,500.00 to the State of Texas, and $10.70 on account of Court costs, whereby it discharged all of the obligations of Gibson Gayle on account of his tax collectorship, whereupon it demanded payment of said sum of $52,268.39 from defendant, which failed and refused to pay the same, or any part thereof."

and that (R. 39, Par. 10):

> "Against the deposits on account of taxes collected by Gibson Gayle, as Tax Collector, and deposited with defendant, as County Depository, for McLennan County, Texas, and the credits therefor, defendant paid to, and for the account of, Gibson Gayle, sums aggregating $131,199.36, and charged the same against said credits, when his reports

had not been approved by the Commissioners' Court."

and concluded, that (R. 41, Par. III):

"On account of misapplications, by Gayle, and defendant, of credits representing taxes collected by Gayle as Tax Collector, and by him deposited with defendant, as County Depository, and their subsequent failure to account therefor, the State had the right to recover from them and complainant the sum of $52,500.00, which, in contemplation of law, represented defendant's obligation to the State, payable on demand, as it would have been if the unauthorized charges had not been made, and on account of which defendant has violated its depository contract."

and (R. 42, Par. IV):

"That complainant, having been compelled, solely on account of the bonds executed by it as surety for Gayle, to pay to the State the sum of $52,500.00 on account of said misapplications and defendant's violation of its depository contract, and the statute, and having paid the same on November 9, 1935, therby and thereupon became subrogee, and equitable assignee, of the State, entitled to its rights, remedies, and exemptions as against the defendant, and having thereupon demanded payment thereof from defendant, and having received on account thereof only $241.61, is entitled to decree and judgment against defendant for the sum of $52,268.39, with interest thereon at the rate of 6% per annum from the 9th day of November, A.D., 1935, until paid."

and (R. 43, Par. IX):

"That the payments of sums aggregating $131,199.36 to Gayle by defendant, against deposits on account of taxes were unauthorized and wrongful."

and that (R. 43, Par. X):

> "Defendant participated in Gayle's breach of trust on account of which, and their violations of contracts, and of law, and the consequent damage to complainant, it is entitled to recover from defendant the sum of $52,268.39, with interest thereon at the rate of 6% per annum from November 9, 1935, against which defendant is entitled to no relief by reason of its cross complaint, or by way of counterclaim, estoppel, setoff, waiver, or otherwise; and entry of decree and judgment accordingly is hereby directed."

The findings do not involve any necessary conflict; but as held in

Daniels v. Wight, 249 S. W. 454 (Tex. Com. App.—adopted by Sup. Ct.) and

Clyde Equipment Co. v. Fiorito, et al., 16 Fed. (2d) 106 (C.C.A.—9th),

if they were susceptible of different constructions, the construction that supports the judgment should prevail.

The argument (Br. 12) with respect to good faith and honesty of purpose is irrelevant, since it ignores the fact of the violation of statute, and the fact that, but for that violation, the loss could not have occurred.

The argument (Br. 12), with respect to alleged fault of the State and respondent, is irrelevant, since, as held in

First Nat. Bank v. Farrell, 272 Fed. 371 (C.C.A. 3rd);

Fidelity & Casualty Co. v. Farmers' Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833;

Wyatt & Wingo v. White, 228 S. W. 154 (Com. App. adopted),

no acquiescence or negligence with respect to petitioner's active violation of contract and law, and participation in breach of trust, could operate to relieve it from liability for the loss caused thereby; and since, as held in

Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865;

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607;

First Nat. Bank v. Farrell, 272 Fed. 371 (C.C.A. 3rd);

G. C. & S. F. Ry. Co. v. Donahoo, 59 Tex. 128;

Fidelity & Casualty Co. v. Farmers Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833,

no estoppel or equity could arise in favor of petitioner to absolve it from the effect of its own wrongful acts.

The argument (Br. 12), to the effect that the statutes necessarily authorized payments and charges on account of checks payable to Gayle, and that petitioner is therefore in the attitude of a depository for a trustee who had unlimited authority to withdraw funds, is irrelevant, since Art. 7250 had not been modified or repealed by any other statute, as we shall now undertake to show in discussing petitioner's Point 2.

Petitioner's Point 2 relates to nothing of substance because Art. 2535 related to state depositories exclusively, being a part of Chap. 1 of Title 47 of the Revised Statutes, and petitioner was county depository (R. 48, Par. 3) designated under Chap. 2 of Title 47 of the Revised Statutes, and Art. 2535 therefore is wholly irrelevant in this matter; and because Arts. 7331, 7332 related exclusively to fees (not taxes), and did not provide for any payment on account thereof by the Collector; and because Art. 7333 related exclusively to fees (not taxes), and it did not provide for any payment on account thereof by

the Collector, but merely for payment thereof from the proceeds of sale for delinquent taxes after the taxes were paid therefrom; and because Art. 7285 related exclusively to money received on account of property redeemed, which did not represent taxes, but funds held for payment to the purchaser at the tax sale; and because Arts. 7141 and 7142 related exclusively to fees on account of inheritance tax collections, for which there was no provision for payment by the collector; and because Art. 7132 related to nothing material in this matter; and because Art. 3891 related exclusively to disposition of fees (commissions), and did not authorize any use of taxes deposited until after the amount thereof representing compensation or fees had been withdrawn from the depository on approved reports of the collector; and because Art. 7336-f related to compilation of delinquent tax records and fees therefor (payable only on approved reports under Arts. 7250, 7260 and 7261—furthermore, Art 7336-f did not become effective until after Gayle had ceased to be Tax Collector); and because Arts. 7335 and 7335-a related exclusively to fees or compensation to be received by the county or district attorney, or other attorney, for delinquent tax collections, and did not provide for any payment by the tax collector; and because Art. 7264-a related exclusively to delinquent taxes, and did not provide for any payment by the collector; and because Art. 7264 related to the insolvent list, and did not purport to authorize any payment from the depository, or to affect, by implication or otherwise, the provisions of Art. 7250; and because Art. 6675-a—3b provided, not for any payment or refund in cash, but for issuance of a credit memorandum to be used for registration of another motor vehicle; and because Art. 3809f provided for no payment by the collector

except from fees after they had been received by him pursuant to approved reports.

With respect to Art. 6675-a—3b, petitioner refers only to Par. (A), which is set forth on page 41 of its brief, and it ignores Par. (C) thereof which expressly forbids any cash payment, and which is as follows, to wit:

> "(C) No refund provided for herein shall be made in cash, but a credit memorandum on a form to be prescribed by the Highway Department shall be issued for the amount of such refund, which shall be accepted by the Tax Collector for the face value thereof, by such person or his assignee on the registration of another vehicle for the current year, for which the destroyed or demolished vehicle was registered, but not otherwise. Such credit shall be allowed out of the county's part of said funds and not the State's. (Acts 1929, 41st Leg., 2nd C. S. p. 172, ch. 88, Sec. 3b, as added Acts 1931, 42nd Leg. p. 215, ch. 127, Sec. 1.)"

Petitioner presents no point with respect to Art. 3937 (p. 9), but it refers thereto on page 17 of its brief. However, any payment thereunder would be equivalent to a payment to a treasurer entitled to receive the same. Furthermore, under Art. 3938 (Acts of 1876, p. 272), payment on account of assessor's fees on proper orders had been thus provided for many years before the passage of Art. 7250, and Art. 7250 could not have been nullified by Art. 3937; on the contrary, Art. 7250 operated to modify Art. 3937 if both may not be given effect. Furthermore, petitioner has been credited for all payments to other officers, and this matter involves nothing except the loss caused by the unauthorized payments to Gayle.

The Circuit Court of Appeals disposed of several of these articles by holding that (R. 166, 167) the loss did not include any payment made under them, or any of them; but, as we have hereinabove shown, none of them conflicted with, or operated to modify, Art. 7250, and it is therefore obvious that there is no merit in petitioner's extended argument (Br. 13-25) to the effect that it should be treated as though it were involved in this matter only as a depository for a trustee who was authorized to withdraw funds against trust deposits without any limitation known to it, and that therefore the decision of the Circuit Court of Appeals is in conflict with the local decision in

Quanah A. & P. Ry. Co. v. Wichita State Bank & Trust Co., 127 Tex. 407, 93 S. W. (2d) 701.

Petitioner is rather in the attitude of a bank which has made payments on account of forged checks, or checks bearing only one signature when two were required, and charged the same to the account of the depositor, since the basis of its liability to the State, and, through subrogation, to respondent, is found in the breach by it of the duty prescribed by statute to make payments only to treasurers entitled to receive the same, and to the Collector for his commissions, as shown by his approved reports, which duty was imposed upon it by statute, of which it is bound to have had knowledge, and by which it is bound whether it had knowledge or not; or, in other words, it must be treated as having made charges on account of payments that were unauthorized because made contrary to the express direction of the depositor.

Petitioner's Point 3 relates to nothing of substance because there is no evidence sufficient to show that there was a shortage in the highway fund, much less a short-

age for which respondent would have been liable, but for the use made by Gayle of $14,562.56 of the payments wrongfully made by petitioner, since there was nothing to show whether or not Gayle had funds on hand in cash.

Mahon v. Kinney County, 28 S. W. 1024 (Tex. Ct. Civ. App.—writ ref.).

Furthermore, a payment by petitioner to cover such a shortage would have been for the benefit of Gayle, and the $14,562.56 was properly considered as part of the commissions for which he and petitioner received credit; and the point involves no suggested conflict with any applicable local decision.

Petitioner's Point 4 relates to nothing of substance because the bonds were not payable to, and did not in any way purport to be for the benefit of, petitioner, and they were given pursuant to Art. 7247, which provided for "bond for state taxes", and that the amount of the bond should be determined by the amount of state taxes assessed during the preceding year, and they were therefore obviously intended to be for the benefit of the State alone.

McRea v. McWilliams, 58 Tex. 328;
Clough v. Worsham, 74 S. W. 350 (Tex. Ct. Civ. App.—writ ref.);
Moody v. Megee, 31 Fed. (2d) 117; aff'd. 41 Fed. (2d) 515 (C.C.A.—5th—Texas);
United States v. National Surety Corporation, 309 U. S. 165, 84 L. ed. 677.

Furthermore, if the bonds had been payable to petitioner, or otherwise designed to inure to its benefit, it could have no right to recover from the surety thereon

for a loss caused, or contributed to, by its own wrongful acts.

> Fidelity & Deposit Co. of Md. v. Farmers' Bank, 44 Fed. (2d) 11 (C.C.A.—8th).

Art. 6003, relied on by petitioner, did not contain any provision for suit on an official bond "by the party injured" until it was amended by the Acts of 1935, page 657, Chap. 270, which became effective August 9, 1935, or more than seven months after Gayle's last term of office had expired, and is therefore not applicable in this matter.

There is no conflict between the decision of the Circuit Court of Appeals in this matter, and the decision of the Texas Court in

> Bordelon v. Philbrick, 84 S. W. (2d) 710,

because it involved a constable, and the liability of his surety for wrongful seizure under a writ of sequestration; or the decision in

> Tabor v. McKenzie, 49 S. W. (2d) 874,

because it involved a sheriff, and the liability of his surety for his wrongful official act; and, as stated by the Court in

> McRea v. McWilliams, 58 Tex. 328,

with respect to the sureties on a mail contractor's bond to the United States:

> "They are bound solely by the contract, and are responsible only to the party with whom the contract is made.";

and, with respect to the bonds of sheriffs, etc.:

> "The bonds of sheriffs, clerks, etc., seem to be an

exception to the general rule; but this is by express statutory provision."

Petitioner's Point 5 relates to nothing of substance because, as shown by an analysis of the stipulated facts, Gayle failed to deposit with petitioner on account of taxes collected the sum of $15,474.31; and his shortage was the result of his having appropriated to his own use that amount, and $131,199.36 wrongfully paid to him by petitioner, making a total of $146,673.67 for which he was chargeable in his accounting with the State, in which he was entitled to, and received, credit for $93,839.33 on account of commissions, and the difference, or $52,834.34, represented his shortage, for which petitioner, as well as he, was primarily liable, since the unauthorized charges made by petitioner exceeded the amount of the shortage, and since, as held in

First National Bank of Chicago v. Newhouse, 17 Fed. (2d) 228 (C.C.A.—7th);

Linscott v. Fidelity & Deposit Co. of Maryland, 145 Pac. 868 (Kan.),

both being wrongdoers, the credit due him should not be applied to reduction of the charges involving petitioner alone, but should be applied against the charges generally.

The opinion of the witness, Kleyboecker, relied on by petitioner (Br. 37) as showing that Gayle failed to deposit $39,351.95, is of no consequence as against the stipulated facts. Furthermore, his opinion contemplated only "taxes in the form collected", to the exclusion of deposits in the form of checks into which money representing taxes in the form collected had been converted by the cashing of checks before making deposits. However, in determining petitioner's liability, it is chargeable with

the amount of all funds received and credited by it, as county depository; and, as held in

> Central National Bank of Baltimore v. Conn. Mut. Life Ins. Company, 104 U. S., 14 Otto, 54, 26 L. ed. 693,

it is immaterial whether it received the identical money collected from the taxpayers, or that which Gayle had substituted therefor.

The credits on account of the deposits belonged to the State, County, and schools.

> Austin v. Kiser, 277 S. W. 411 (aff'd. 286 S. W. 1082—Comm. App. adopted by Sup. Ct. of Texas),

and, with respect thereto, petitioner could have "no equity equal to that of the real owner".

> Maryland Casualty Company v. City Nat. Bank, 29 Fed. (2d) 662 (C.C.A.—6th).

There is no merit in petitioner's assertion (P. 3) to the effect that it acted innocently in crediting all deposits to the collection account, and that it believed that it was authorized to do so by the opinion of the attorney general (R. 72-74) based on

> State v. Harvey, 15 S. W. (2d) 82,

especially since it thereby evaded payment of interest for a period of several days (R. 72, Par. 27), because that opinion suggested the contrary, since petitioner was thereby advised that, upon giving credit for a deposit, it would become liable for interest on account thereof, as well as for the amount of any not good checks which might be included therein; and because, by the evading of interest in that way, petitioner did receive a benefit, as held in

Fidelity & Casualty Company v. Farmers' Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833.

There is no merit in petitioner's assertion that it did not violate the law, since Art. 2549 of the Revised Civil Statutes of Texas, 1925, provided for a county depository, and that

> "It shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository * * *, as soon as collected, pending the preparation of his report of such collections and settlement thereon, * * *"

and Art. 7250 thereof provided that:

> "Except as to compensation due such tax collector as shown by his approved reports, tax money deposited in county depositories shall be paid by such depositories only to treasurers entitled to receive the same, on checks drawn by such tax collector in favor of such treasurer."

and, by Art. 7260 thereof, the collector was "at the end of each month" required to "make an itemized report under oath to the comptroller, showing each and every item of * * * taxes collected by him during said month accompanied by a summarized statement showing full disposition of all state taxes collected," and to "present such report, together with the tax receipt stubs, to the county clerk" for examination, and, by Art. 7261 thereof, he was required to, "at the end of each month, make like reports to the Commissioners' Court of all collections made for the county," and, by paragraph 4 thereof, it was provided that:

> "At the next regular meeting of the commissioners court, the tax collector shall appear before said

> court and make a summarized statement, showing the disposition of all moneys, both of the State and county, collected by him during the previous three months. Said statement must show that all taxes due the State have been promptly remitted to the State Treasury at the end of each month, and all taxes due the county have been paid over promptly to the county treasurer and shall file proper vouchers and receipts showing same."

and, by paragraph 5 thereof, it was provided that:

> "The commissioners court shall examine such statement and vouchers, together with an itemized report and tax receipt stubs filed each month, and shall compare the same with the tax rolls and tax receipt stubs. If found correct in every particular, and if the tax collector has properly accounted for all taxes collected, as provided above, the commissioners court shall enter an order approving said report, and the order approving same shall be recorded in the minutes."

from which it is clear, as held by the Circuit Court of Appeals in this case, and by the El Paso Court of Civil Appeals in

> New Amsterdam Casualty Company v. First National Bank of Gilmer, 134 S. W. (2d) 470,

in which the Supreme Court of Texas dismissed application for writ of error "for want of jurisdiction—correct judgment", that petitioner violated Art. 7250 in charging against the deposits payments made by it to Gayle on account of checks drawn by, and payable to, him, not covering his compensation, as shown by his reports approved by the Commissioners' Court (none having been approved by that court), and that petitioner should reimburse respondent for the resulting loss.

It is immaterial whether or not petitioner participated

in the default by receiving a benefit therefrom, since, to the extent of the amount of respondent's loss, the charges, made by petitioner against the deposits, supported, as they are, only by checks drawn by, and payable to, the Collector, cannot be sustained, and petitioner remains liable to the extent thereof precisely as it would be if they had not been made.

New Amsterdam Casualty Company v. First National Bank of Gilmer, 134 S. W. (2d) 470;
Watson v. El Paso County, 202 S. W. 126 (Tex. Ct. of Civ. App.);
Fidelity & Casualty Co. v. Farmers' Nat. Bank, 275 N. Y. 194, 9 N. E. (2d) 833;
Leather Manufacturers Nat. Bank v. Merchants Nat. Bank, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. ed. 342;
United States v. Nat. Bank of Commerce, 205 Fed. 433 (C.C.A.—9th).

There is no merit in petitioner's assertion (Br. 36) that "it has fully accounted for all of the moneys included in the item of $131,199.36", since, as hereinabove shown, Gayle has received credit for $93,839.33 on account of commissions, and petitioner has received credit therefor except as to the $15,474.31 which he had not deposited, but had retained as against commissions, with respect to which $15,474.31 petitioner was therefore not entitled to credit, and since, as stated by the Court on the first appeal (100 Fed. (2d) 807):

> "The proof as to deposits and withdrawals amounted * * * to this; * * * that crediting him (Gayle) on all his accounts with all of his commissions, and all other proper charges, he had accounted for all the moneys he had collected except $52,268.39, the amount in controversy";

and since, as already pointed out, there is no evidence

sufficient to show that there was a shortage of $14,562.56 in the highway fund; and since, as already shown, it is immaterial whether $23,877.66 of the deposits received and credited by petitioner, or any other amount, represented taxes deposited in the form collected, or in some other form.

It is therefore submitted that there is no merit in any point suggested by petitioner; that the decision of the Circuit Court of Appeals does not, in any particular, conflict with any applicable local decision, or with any applicable local statute; that the decision is a correct and proper one, and should not be disturbed, and that the petition for writ of certiorari should be denied.

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